LIBRARY
SUPREME COURT, U. S.

FILED
JUN 1 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 99

THE CINCINNATI GAS & ELECTRIC COMPANY AND THE CITY OF CINCINNATI, *Petitioners,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

BRIEF OF RESPONDENT, TEXAS GAS TRANSMISSION CORPORATION, IN OPPOSITION

CHRISTOPHER T. BOLAND
GEORGE J. MEIBURGER
Gallagher, Connor and Boland
821 Fifteenth Street, N. W.
Washington, D. C. 20005
Attorneys for Respondent, Texas Gas Transmission Corporation

ROBERT O. KOCH
Vice President & General Counsel
Texas Gas Transmission Corporation
3800 Frederica Street
Owensboro, Kentucky 42301
Of Counsel

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	1
STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
ARGUMENT—CERTIORARI SHOULD BE DENIED	4
CONCLUSION	7
CASES:	
Atlantic Refining Co. v. Federal Trade Commission, 381 U.S. 357 (1965)	7
Cincinnati Gas & Elec. Co. v. Federal Power Comm'n., 376 F.2d 506 (6th Cir. 1967)	5
F.P.C. v. Transcontinental Gas Pipe Line Corp., 365 U.S. 1 (1961)	6
N.L.R.B. v. Hearst Publications, Inc., 322 U.S. 111 (1944)	7
Unemployment Compensation Commission v. Aragan, 329 U.S. 143 (1946)	7
Universal Camera Corp. v. N.L.R.B., 340 U.S. 474 (1951)	5
STATUTES:	
Natural Gas Act, Sec. 7(a) (15 U.S.C. § 717f(a), 52 Stat. 824 (1938))	2, 3
Sec. 7(c) (15 U.S.C. § 717f(c), 52 Stat. 825 (1938), as amended. 56 Stat. 83 (1942))	2, 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1435

THE CINCINNATI GAS & ELECTRIC COMPANY AND THE CITY OF CINCINNATI, *Petitioners,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

BRIEF OF RESPONDENT, TEXAS GAS TRANSMISSION CORPORATION, IN OPPOSITION

Respondent, Texas Gas Transmission Corporation (Texas Gas) respectfully submits that the petition for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit filed herein should be denied.

QUESTION PRESENTED

Did the Court below correctly affirm an order of the Federal Power Commission (Commission) where there was a substantial evidentiary basis for the findings and conclusion in support of the Commission's order directing Texas Gas to serve the natural gas requirements of the City of Hamilton, Ohio?

STATUTES INVOLVED

Section 7(a) of the Natural Gas Act[1] provides:

> Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged . . . in the distribution of natural or artificial gas to the public . . .

Section 7(c) of the Natural Gas Act[2] provides:

> No natural-gas company . . . shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, . . . unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts . . .

STATEMENT OF THE CASE

Texas Gas is a major interstate natural gas pipeline subject to regulation in its natural gas wholesale and transmission activities by the Commission under the Natural Gas Act. Texas Gas' pipeline facilities pass in the vicinity of Hamilton, Ohio.

The City of Hamilton operates its own municipal gas distribution system. Hamilton serves approximately 20,000 natural gas customers. For many years its gas requirements had been purchased directly from Cin-

---

[1] 52 Stat. 824 (1938), 15 U.S.C. § 717f(a).

[2] 52 Stat. 825 (1938), as amended, 56 Stat. 83 (1942), 15 U.S.C. § 717f(c).

cinnati Gas & Electric Company (CG&E), which is, primarily, a distribution company itself, serving the nearby city of Cincinnati, Ohio and environs. Hamilton was CG&E's only wholesale customer and Hamilton's annual purchases accounted for approximately five percent (5%) of CG&E's market. The then effective contract between CG&E and Hamilton was terminable, upon proper notice. CG&E gave notice to Hamilton of termination of this contract, according to its terms, on September 3, 1966.

When Hamilton and CG&E were unable to agree upon a contract acceptable to both parties, for service subsequent to September 3, 1966, Hamilton sought natural gas service from Texas Gas by filing an application under Section 7(a)[3] of the Natural Gas Act seeking an order directing Texas Gas to sell gas to the City. Subsequently, Texas Gas filed an application under Section 7(c)[4] of the Natural Gas Act for authority to construct and operate the required facilities contingent upon the Commission's finding that the rendition of the service requested by Hamilton would be in the public interest. There was no issue in the proceedings before the Commission with respect to the Texas Gas application as such. The hearing examiner found:

> "The evidence introduced by Texas Gas in support of its application is uncontroverted; all parties having waived cross-examination of its witnesses. The facilities proposed are adequate to render the service requested by Hamilton; costs are reasonable; reserves adequate; and the project presents no problems as to engineering, financing, markets, or economic feasibility." (R. 512)

---

[3] Supra, p. 2.

[4] Supra, p. 2.

The Commission adopted the Examiner's findings and found, additionally, that Texas Gas' service to Hamilton would provide benefits for Texas Gas' other customers, as well as for the City of Hamilton (R. 534).

The controversy in the proceedings before the Commission centered on the question of whether Hamilton should be permitted to purchase its then existing gas requirements from Texas Gas or whether it should be required to continue to obtain them from CG&E. A third alternative was whether Hamilton's requirements should be obtained directly from Ohio Fuel Gas Company, a supplier of CG&E. The Commission found that it was in the public interest for Texas Gas to render the service requested by Hamilton. Thus, it directed Texas Gas to sell gas to Hamilton in volumes up to 37,550 Mcf[5] per day. In connection therewith, the Commission authorized the construction and operation of the facilities set forth in Texas Gas' application which were estimated to cost $7,816,000 (R. 526).

Petitioner did not seek a stay of the Commission's order either from the Commission or from the court below. The Texas Gas pipeline facilities, which the Commission authorized, have been constructed. Hamilton has been receiving service from Texas Gas since the early part of January, 1968, pursuant to the authorization and direction of the Commission.

ARGUMENT

CERTIORARI SHOULD BE DENIED

The petition does not set forth any basis for the issuance by this Court of the writ of certiorari. Petitioner does not contend that the decision below gives rise to

[5] 1000 cubic feet at a pressure base of 14.73 pounds per square inch absolute.

a conflict between circuits, or that an important federal question is involved. Nor does Petitioner contend that the record is devoid of substantial evidence to support the Commission's findings and conclusion.

Petitioner doesn't even contest the affirmative finding of the Court below (389 F. 2d 277 (1968)) that there was, in fact, substantial evidence to support the findings of the Commission:

> "We find that there was substantial evidence to support the findings of fact of the Commission. They are binding on us. 15 U.S.C. § 717r(b); *Universal Camera Co.* v. *N.L.R.B.*, 340 U.S. 474 (1951); *Cincinnati Gas & Elec. Co.* v. *Federal Power Comm'n*, 376 F. 2d 506 (6th Cir. 1967)."

Petitioner merely seeks to reargue, *de novo*, the case which it, heretofore, presented to the Commission. Petitioner's principal contention before this Court, as it was in the court below, is that the Commission's decision authorizing and directing Texas Gas to sell natural gas to Hamilton is erroneous because it (the Commission) did not properly weigh or balance the resulting adverse impact on CG&E, its consumers and their supplier. Obviously, however, this is a matter which falls within the administrative expertise of the Commission.

As correctly noted by the Court below (389 F. 2d 274 (1968)) there is no dispute about the fact that Texas Gas will provide Hamilton with the lowest cost gas supply. The extent of the benefits to Hamilton and its consumers was measured by calculating Hamilton's expenses and revenues on the assumption that Texas Gas supplies are substituted for CG&E supplies. Petitioners concede this was proper (Pet. 7).

The Petitioner, CG&E, presented adverse impact evidence in the proceeding before the Commission. On the basis of this evidence, Petitioners contend that the resulting adverse impact on CG&E, its consumers and their supplier, outweighs the admitted cost advantages to Hamilton and its consumers from the Texas Gas supply (Pet. 12, 17, 18). Both the trial examiner and the Commission carefully considered CG&E's impact evidence (Pet. App. 53B, 57B-60B, R. 517-518, 531-532) but, on the basis of the entire record, both reached conclusions adverse to Petitioner's contentions.

Further, Petitioner has proceeded upon the mistaken assumption that "... the issue was resolved completely on the basis of economic impact ..." (Pet. 18). This is just not so. The Commission did not reach its decision *solely* on the basis of economic impact. It took into account many other factors such as a concern that the rate from CG&E to Hamilton may not be regulated (Pet. 52B). In this connection, the Commission noted that the rates being offered by CG&E would not meet the cost of rendering the service (Pet. 59B). The Commission also specifically pointed to the fact that Hamilton is the only gas distributor in the State of Ohio which buys its natural gas supply from another gas distributor and does not have a direct source of gas supply from an interstate pipeline (Pet. 62B). A consideration of these, and the other factors relied upon by the Commission, was proper. *F.P.C.* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 23 (1961).

It is clearly not the function of the reviewing court to consider, *de novo*, the record before the administrative agency and make new findings or substitute its evaluation of the record for the Commission's determinations.

A reviewing court need not find that the Commission's ultimate conclusion is the only reasonable one, or even that it is the result which this Court would have reached had the question arisen, in the first instance, in a judicial, rather than an administrative, proceeding. As this Court has held, once it has been determined that the Commission's findings and ultimate conclusions have "warrant in the record" and a "reasonable basis in law," the responsibility of the reviewing court is at an end. *Atlantic Refining Co.* v. *Federal Trade Commission,* 381 U.S. 357, 367-368 (1965); *Unemployment Compensation Commission* v. *Aragan,* 329 U.S. 143, 154-155 (1946); *N.L.R.B.* v. *Hearst Publications, Inc.* 322 U.S. 111, 131 (1944).

CONCLUSION

WHEREFORE, it is respectfully submitted that the Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the 6th Circuit entered herein on February 16, 1968 should be denied.

Respectfully submitted,

CHRISTOPHER T. BOLAND
GEORGE J. MEIBURGER
Gallagher, Connor and Boland
821 Fifteenth Street, N. W.
Washington, D. C. 20005
Attorneys for Respondent, Texas Gas Transmission Corporation

ROBERT O. KOCH
Vice President & General Counsel
Texas Gas Transmission Corporation
3800 Frederica Street
Owensboro, Kentucky 42301
Of Counsel